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15		
	IN THE UNITED STATES	S DISTRICT COURT
16	FOR THE NORTHERN DIST	
17	SAN FRANCISCO	O DIVISION
'		
18		
	TELESOCIAL, INC.,	
9	TEEBS CERTE, ITC.,	Case No. 3:14-cv-03985-JD
	Plaintiff,	
20	i mineri,	DEFENDANTS' NOTICE OF MOTION
	v.	AND MOTION TO EXCLUDE THE
21	v.	OPINIONS AND TESTIMONY OF
		STEPHEN GRAY AND MEMORANDUM
22	ORANGE S.A., et al.,	OF POINTS AND AUTHORITIES IN
,,	Old ii (GE 5.71., et al.,	SUPPORT THEREOF
23	Defendants.	Data: Eshman: 16 2017
24		Date: February 16, 2017 Time: 10:00 a.m.
7		Ctrm: 11, 19th Floor
25		Judge: Honorable James Donato
		Trial: April 10, 2017
26		11mi 11pii 10, 2011
27		
- 1	I .	

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10	Cabrera v. Cordis Corp., 134 F.3d 1418 (9th Cir. 1998)
11	Computer Economics, Inc. v. Gartner Group, Inc., 50 F. Supp. 2d 980 (S.D. Cal. 1999)
12 13	Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311 (9th Cir. 1995)
14	Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)
15 16	Diviero v. Uniroyal Goodrich Tire Co., 114 F.3d 851 (9th Cir. 1997)
17 18	Feduniak v. Old Republic Nat'l Title Co., No. 13-cv-02060-BLF, 2015 U.S. Dist. LEXIS 57694 (N.D. Cal. May 1, 2015)
19	Fernlund v. TransCanada USA Servs. Inc., No. 1:13-cv-01495-CL, 2014 U.S. Dist. LEXIS 159386 (D. Or. Oct. 3, 2014)
20 21	GE v. Joiner, 522 U.S. 136 (1997)
22	GPNE Corp. v. Apple, Inc., No. 12-02885, 2014 U.S. Dist. LEXIS 53234 (N.D. Cal. Apr. 16, 2014)
23 24	Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991)
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3	Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)
5	McGlinchy v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988)
6	Open Text S.A. v. Box, Inc., No. 13-04910, 2015 U.S. Dist. LEXIS 8783 (N.D. Cal. Jan. 23, 2015)
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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 16, 2017 at 10:00AM, or at a different time and date set by the Court, Defendants Orange S.A. and all individual defendants (collectively, the "Orange Defendants") hereby move the Court for an order prohibiting Plaintiff from offering the testimony or Rule 26 Reports of Stephen Gray for any purposes in these proceedings.

This motion is made pursuant to Fed. R. Evid. 702 and 403, and is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities included herewith, the Declaration of Anthony Mirenda and Exhibits thereto, the Proposed Order submitted herewith, all pleadings and papers on file in this action, and such further evidence, argument, and exhibits that may be submitted to the Court at or before the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

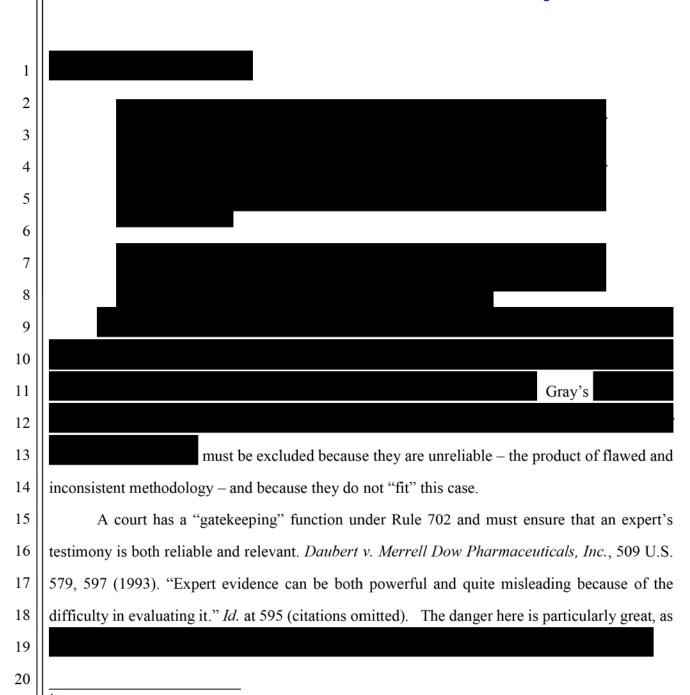
INTRODUCTION

From the outset of this case, Telesocial has characterized its claims in dramatic and extreme terms, leading the Court to describe Telesocial's core Computer Fraud and Abuse Act ("CFAA") (18 U.S.C. § 1030) claim as follows:

As the facts alleged in the FAC make clear, this claim is premised entirely upon events that occurred after the abrupt termination of the discussions subject to the NDA, and is necessarily based on Orange's unauthorized access to information that Telesocial did not disclose during those negotiations. Dkt. No. 37 ¶¶ 35, 39-49, 64-66. Specifically, the CFAA claim states that Orange hacked into Telesocial's protected servers in Emeryville, California, without authorization or permission and using aliases and fake computer accounts, accessed Telesocial's crown-jewel software code, and fraudulently copied it. *Id.* ¶¶ 61-74.

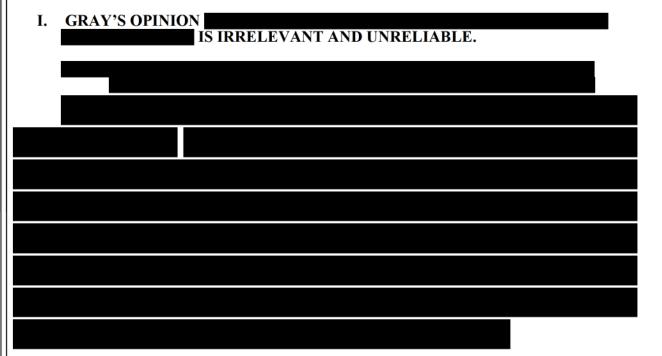
Order Den. Mot. Dismiss 5, Dkt. No. 85.





Telesocial initially disclosed the nationally recognized computer forensics firm of Stroz Friedberg and no fewer than seven Stroz consultants as its technical experts. Mirenda Decl. 121. Stroz then undertook what appears to be significant effort, including five visits to examine Orange's source code, each lasting 5-7 hours, in July and August, 2016. *Id.* Then, on September 17, 2016, two weeks before the end of fact discovery, Telesocial identified Gray as a technical expert. *Id.*

ARGUMENT

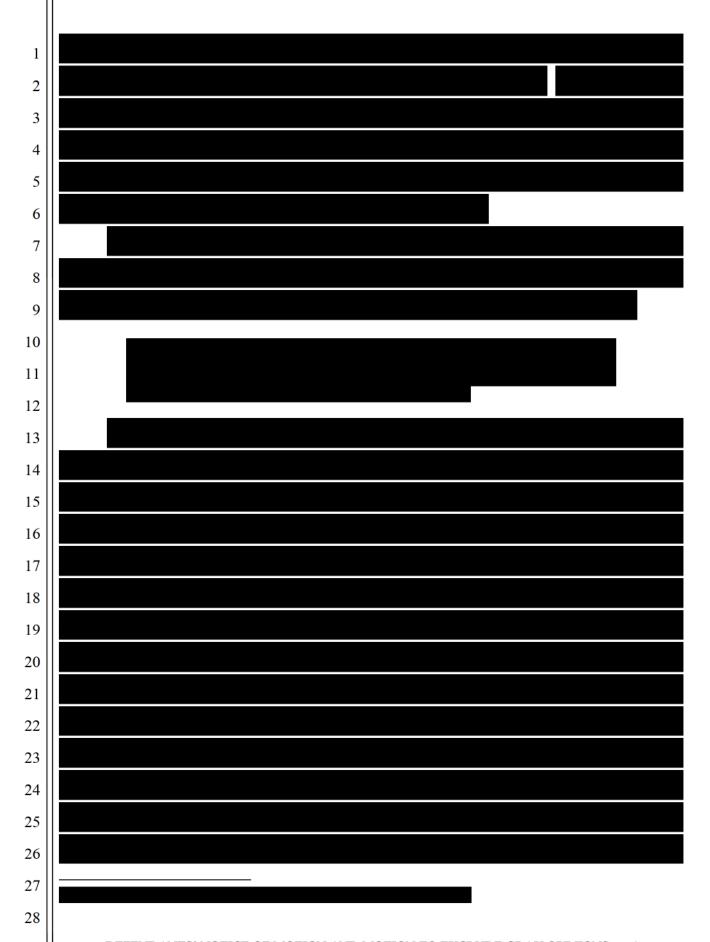


Evidence is relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 591. This consideration has been described as one of "fit" — "whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Feduniak v. Old Republic Nat'l Title Co.*, No. 13-cv-02060-BLF, 2015 U.S. Dist. LEXIS 57694, at *4-5 (N.D. Cal. May 1, 2015) (citing *Daubert*, 509 U.S.). What is relevant depends on the law defining the claim. *See Primiano v. Cook*, 598 F.3d 558, 566-67 (9th Cir. 2010).

by Section 2019.210 of the California Uniform Trade Secrets Act ("CUTSA"). Cal. Civ. Code §§3426.1-3426.11. "The rule requiring a plaintiff to disclose its trade secrets at the outset of discovery . . . prevents plaintiffs from using the discovery process as a means to obtain the

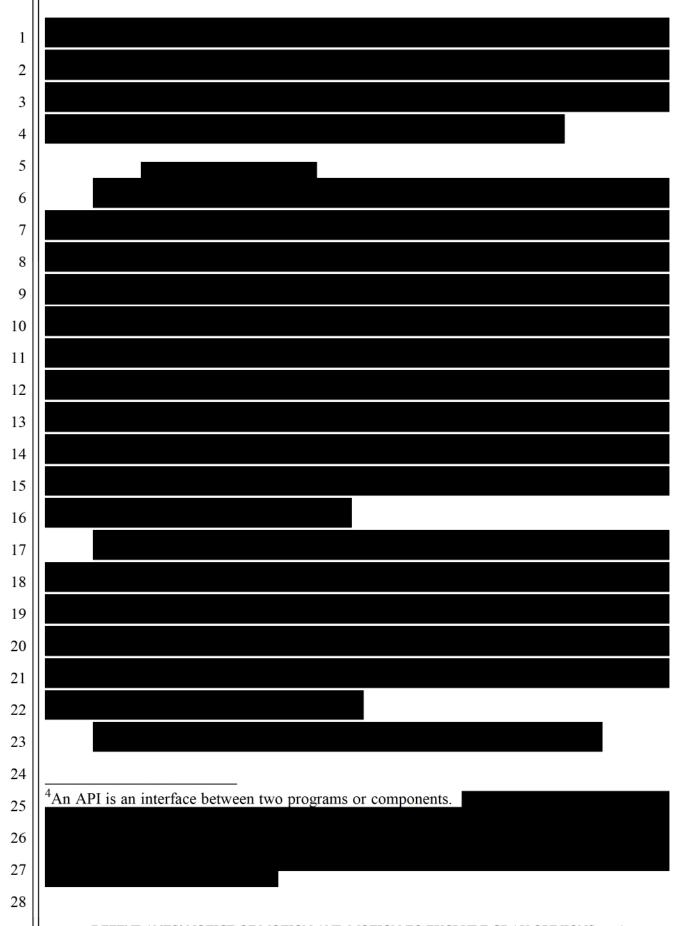


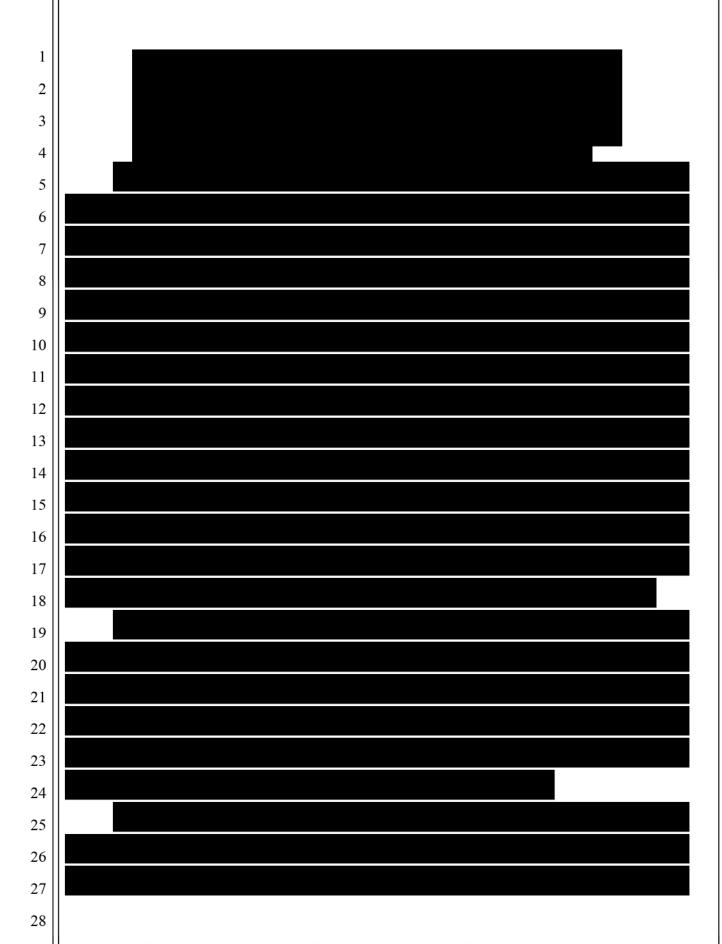
1	defendant's trade secrets." Computer Economics, Inc. v. Gartner Group, Inc., 50 F. Supp. 2d 980,
2	985 (S.D. Cal. 1999). "A true trade secret plaintiff ought to be able to identify, up front, and with
3	specificity the particulars of the trade secrets without any discovery." JobScience, Inc. v.
4	CVPartners, Inc., No. 03-04519, 2014 U.S. Dist. LEXIS 64350, at *14 (N.D. Cal. May 1, 2014).
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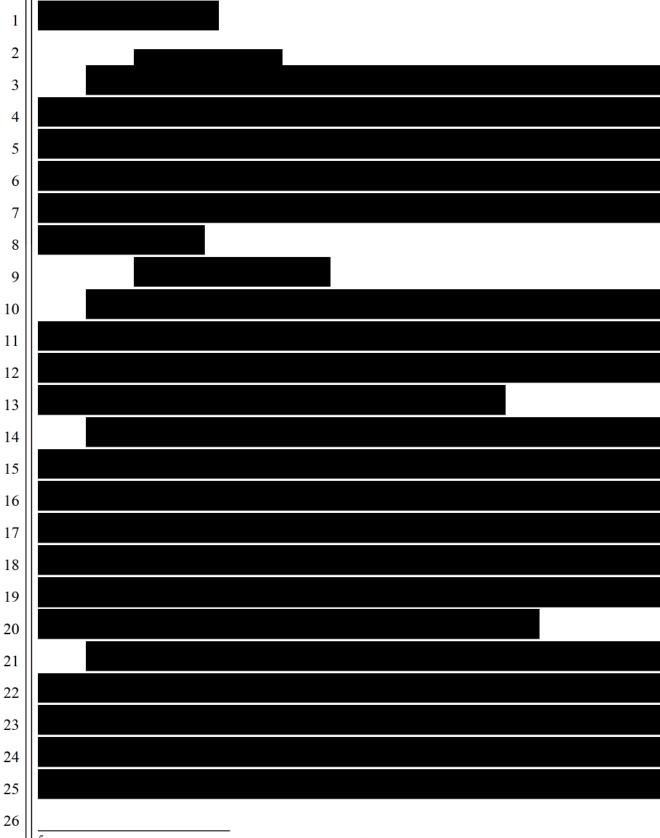


This tactic is contrary to CUTSA and should not be permitted. See Agency Solutions. Com, LLC v. TriZetto Grop., Inc., 819 F. Supp. 2d 1001, 1015 (E.D. Cal. 2011) ("It is crucial to any CUTSA cause of action—and any defense—that the information claimed to have been misappropriated be clearly identified."); Altavion, Inc. v. Konica Minolta Sys. Lab. Inc., 226 Cal. App. 1st. Dist. 26, 43-44 (2014). In exercising its gatekeeping function, the Court "should also be mindful of other applicable rules," including Rule 403 which permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..." Daubert, 509 U.S. at 595. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Id. (internal citation omitted). Given these tactics, Gray's opinions "confuse, rather than clarify, Plaintiffs' allegations" and are likely to mislead the jury. Fernlund v. TransCanada USA Servs. Inc., No. 1:13-cv-01495-CL, 2014 U.S. Dist. LEXIS 159386, at *9 (D. Or. Oct. 3, 2014).









⁵ One document, which has a Telesocial Bates number, TS-OG00184452, is actually an Orange internal e-mail.

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13	Gray follows no recognizable methodology
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15	Where an expert's methodology is "not visible to the eyes of the Court, the jury, and
16	opposing counsel, or testable in the crucible of cross-examination," that opinion should be
17	excluded. Open Text S.A. v. Box, Inc., No. 13-04910, 2015 U.S. Dist. LEXIS 8783, *21 (N.D. Cal.
18	Jan. 23, 2015). Indeed, that opinion rests not on adequate supports, but is effectively the expert's
19	say-so, and "nothing in either <i>Daubert</i> or the Federal Rules of Evidence requires a district court to
20	admit opinion evidence that is connected to existing data only by the <i>ipse dixit</i> of the expert." GE
21	v. Joiner, 522 U.S. 136, 146 (1997).
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6	"While source code is undoubt[ed]ly a trade secret, the way the source
7	code works when compiled and run is not." Agency Solutions. Com, 819 F. Supp. 2d at 1017.
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17	"is a 'black box into which data is fed at
18	one end and from which an answer emerges at the other,' and the jury cannot see how the pieces
19	fit together or how the data drives the conclusion." <i>Open Text</i> , 2015 U.S. Dist. LEXIS 8783, *21
20	(citation omitted).
21	Gray's assertion cannot be
22	tested and is therefore unreliable. See United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000)
23	(citing Daubert); Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 463 (9th Cir. 2014) (citing
24	Hankey). "[T]he Court must be able to see the mechanisms in order to determine if they are reliable
25	and helpful" and cannot here do so. GPNE Corp. v. Apple, Inc., No. 12-02885, 2014 U.S. Dist.
26	LEXIS 53234, *18 (N.D. Cal. Apr. 16, 2014) (citation omitted). "Lacking any sound foundation,
27	[Gray's analysis] would mislead a jury into believing" that Telesocial practiced these trade secrets
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1	and should be excluded. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 807 (9th Cir. 1988).
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9	II. GRAY'S OPINIONS ARE UNSUBSTANTIATED SPECULATION.
10	ARE UNSUBSTANTIATED SPECULATION.
11	Gray's opinions
12	are inadmissible because
13	Gray's reasoning is "simply a
14	subjective, conclusory approach that cannot reasonably be assessed for reliability" FED. R.
15	EVID. 702 advisory committee's note to 2000 amendments. "Rule 702 demands that expert
16	testimony relate to scientific, technical, or other specialized knowledge, which does not include
17	unsubstantiated speculation and subjective beliefs." Diviero v. Uniroyal Goodrich Tire Co., 114
18	F.3d 851, 853 (9th Cir. 1997). The purpose of the <i>Daubert</i> gatekeeping function is "to make
19	certain that an expert, whether basing testimony upon professional studies or personal experience,
20	employs in the courtroom the same level of intellectual rigor that characterizes the practice of an
21	expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). "[T]he
22	gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'" <i>Id.</i> at 150 (citing <i>Daubert</i>).
23	Opinion based on "unsubstantiated and undocumented information is the antithesis of [a]
24	scientifically reliable expert opinion" Cabrera v. Cordis Corp., 134 F.3d 1418, 1423 (9th Cir.
25	1998).
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1	Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 395-96
2	(N.D. Cal. 1991) ("[I]t would be fundamentally misleading if testimony that was being
3	presented as the independent thinking of an 'expert' in fact was the product, in whole or significant
4	part, of the suggestions of counsel.").
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6	a. Gray's opinion on Orange's alleged "accesses" to Telesocial's servers is based on flawed reasoning and no known methodology.
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20	Experts may rely on other experts under <i>Daubert</i> . However, they may not rely
21	on a mischaracterization of another expert's conclusions. GE, 522 U.S. at 145 (excluding expert
22	who relied on second expert's study which did not support first expert's conclusion).
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13	The
14	situation here is analogous to GE v. Joiner, in which expert testimony was excluded because it
15	compared the injection of PCBs in a highly concentrated form in mice to a much smaller exposure
16	to an adult human. GE, 522 U.S. at 144.
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20	Gray's comparison is
21	misleading and has no "substance such that it would be helpful to a jury." Alaska Rent-A-Car-,
22	Inc. v. Avis Budget Group, 738 F.3d 960, 969-70 (9th Cir. 2013).
23	b. Gray's opinion on the Telesocial Terms of Use is speculative and unreliable.
24	"[E]xperts must explain precisely how they went about reaching their conclusions and
25	point to some objective source" Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1319
26	6 Orange's expert examined the server-side code for the HTML pages discussed in the Guimond-
27	Godiniaux e-mail exchange to see whether Telesocial's code resembled any Orange server side code. It did not. Mirenda Decl. Ex. I at §§III.B, C; Ex. J at ¶ 238.
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1	(9th Cir. 1995). Relying on a plaintiff's testimony, without more, when it is contradicted by other
2	facts is not permissible. See Krouch v. Wal-Mart Stores, Inc., No. 12-cv-02217-YGR, 2014 U.S.
3	Dist. LEXIS 152755, at *19-20 (N.D. Cal. Oct. 28, 2014).
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17	Under Daubert, particularly in the face of contrary evidence, Gray was required to evaluate
18	the reasonableness of relying on this assertion.
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20	Gray's "inability to dismiss
21	various other possible causes," his "lack of knowledge" about the source code, and his "inability
22	satisfactorily to explain the reasoning behind his opinions" make his testimony "unsubstantiated
23	and subjective, and therefore unreliable and inadmissible." <i>Diviero</i> , 114 F.3d at 853.
24	CONCLUSION
25	For all the foregoing reasons, Orange respectfully requests that the Court grant this Motion
26	and issue an order prohibiting from offering the testimony or Rule 26 Reports of Stephen Gray for
27	any purposes in these proceedings.

1	Respectfully submitted,
2	ORANGE, S.A., et al.
3	By their attorneys,
4	Daniel Schimmel (pro hac vice)
5	Anthony Mirenda (pro hac vice)
6	/s/ Anthony D. Mirenda
7	Anthony D. Mirenda
8	FOLEY HOAG LLP
9	
10	Dated: January 6, 2017
11	
12	FILER'S ATTESTATION
13	
14	Pursuant to Civil L.R. 5-1(i)(3), regarding signatures, I, Daralyn J. Durie, attest that
15	concurrence in the filing of this document has been obtained.
16	_/s/ Daralyn J. Durie
17	Daralyn J. Durie
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